

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

Corrected Copy

77-1065

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN TARKO and ROBERT MYLAN,

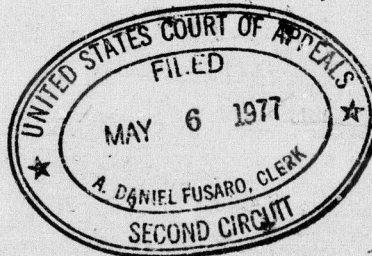
Defendants-Appellants,

On Appeal from the United States
District Court, for the Eastern District
of New York,

APPENDIX TO BRIEF FILED ON
BEHALF OF DEFENDANT-
APPELLANT TARKO

McCARTHY and DORFMAN
Attorney for Defendant-
Appellant Tarko
10 Village Square
Glen Cove, NY 11542

DAVID W. McCARTHY, ESQ.
Of Counsel



PAGINATION AS IN ORIGINAL COPY

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CRIMINAL DOCKET - U.S. District Court		76 CR 467		MISHLER, J.	
Y OFFENSE PO	JUDGE/MAGIS. RATE Assigned	U.S.	Case Filed Mo	Day	
IR OFFENSE MO	0712		7	22	
DEFEAT/OF Mis	207 1	Dispr Sentence	76	467	2
FEELDY Fel	District Office	JOHN TARKO			
		(LAST, FIRST, MIDDLE)			

U.S. TITLE SECTION

18-2, 371 & 641

OFFENSES CHARGED

Did receive, conceal stolen property of the USA (Treas. Checks payable to others)

ORIGINAL COUNTS

14

U.S. MAG. CASE NO. 76 M 1388

RAIL • RELEASE

☐ Denied	AMT	☐ Fugitive
Set	XX	☒ Pers Recog
\$20,000		☐ PSA
Date		conditions
☐ Bail Not Made		☐ 10% Deposit
☐ Status Changed (See Docket)		☐ Surety Bond
		☐ Collateral
		☐ 3rd
		☐ Prty Cust
		☐ Other

II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Began

High Risk Date

INDICTMENT ☒Information ☐

7-22-76

ARRAIGNMENT

7/29/76

TRIAL

Trial Set For

Voor Dire ☐

Summons Served

Indict. Waived ☐1st Plea ☒LXNG ☐ G ☐ NOLTrial Began ☐

First Appearance

In Charging District

Superseding ☐Indict/Info ☐

Final Plea

11/22/76

{ G. Plea W/Drawn

Trial Ended ☐

7-1-76

LXNG ☒ G ☐ NOL

SENTENCE

Disposition of Charges

☐ Convicted☐ Acquitted☐ Dismissed☐ On All Charges☐ On Lesser Offense(s)☐ WOP: ☐ WP☐ On Government's Motion

Search Warrant	Issued	DATE	INITIAL/NO.	MAGISTRATE	INITIAL/NO.	OUTCOME:
	Return			INITIAL APPEARANCE DATE		☐ DISMISSED
Summons	Issued			PRELIMINARY EXAMINATION	Date 7-21-76	☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
	Served			OR	Date	☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW
Arrest Warrant Issued				REMOVAL HEARING		
COMPLAINT		7-1-76	ASC/070B	☒ WAIVED ☐ NOT WAIVED	Tape Number	
OFFENSE (In Complaint)				☐ INTERVENING INDICTMENT		

U.S. Attorney or Asst.

ATTORNEYS

Defence ☒ CJA ☐ Ret ☐ Waived ☐ Self ☐ None / Other ☐ PD ☐ CD

Katzberg

David McCarthy, Esq.
1527 Franklin Ave.,
Minelola, NY 11501

BEST COPY AVAILABLE

* Show last names and suffix numbers of other defendants on same indictment/information

MYLAN 1

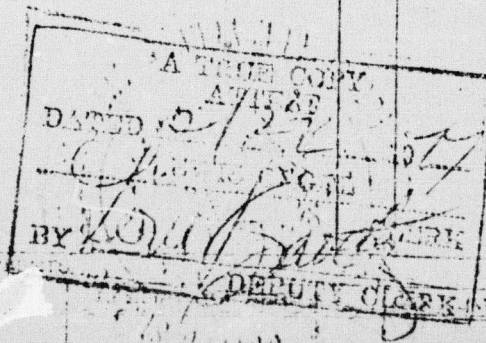
EXCLUDABLE DELAY

(a) (b) (c) (d)

DATE	(DOCUMENT NO.)	PROCEEDINGS	
7/8/76		Letter of acceptance of assignment recd. and on file.	
7/19/76		Hearing waived telephonically - letter to follow from D.C. McCarthy.	
7-22-96		Before Costantino J - Indictment filed	
7/29/76		Before MISHLER, J. - Case called. Deft & Counsel present. Deft arraigned and on his own behalf enters a plea of not guilty. Bail continued. Trial set for 9/3/76 at 11:00 a.m.	8/9/76 I 9/3/76
7/30/76		Notice of Readiness for trial filed.	
9/3/76		Notice of Motion to suppress with affirmation filed and sent back to chambers as requested.	
9-3-76		Before Mishler, Ch J - case called - deft & counsel present - case adjd to 9-17-76 at 9:30am for setting of trial date pending decision in motions of both defts.	
9/17/76		Before MISHLER, CH. J.- Case called. Deft and counsel present. Trial date set down for 11/22/76	9/17/76 T

DATE		IV. PROCEEDINGS (Continued)	PAGE 10	V. EXCLUDABLE DELAY	
10-18-76		By MISHLER, CH J -Memorandum of decision and order filed denying defts motion to suppress. The evidentiary hearing on the oral admissions will be held on first day of trial scheduled to begin on Nov. 22, 1976. Clerk is directed to enter judgment dismissing defts' motion to suppress. Case called./			
11/22/76		Before MISHLER, CH . J.- Deft and counsel present. Deft withdraws his plea of not guilty to count 1 and after being advised of his rights by the Court and on his own behalf enters a plea of guilty to count 1. Sentence adjd without date. Bail conditions continued.			
1-28-77		Before MISHLER, CH J - case called - deft & counsel David McCarthy present - deft sentenced on count 1 to a term of imprisonment under 18:5010(b). On motion of AUSA Woodfield counts 2 to 14 are dismissed. Clerk to file Notice of appeal without fee on court's decision Oct. 15, 1976. Bail contd pending appeal.			
1-28-77		Judgment & commitment filed - certified copies to Marshall.			
2/22/77		Record on appeal certified and hand delivered to the C of A by Joan Gill			

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	DEPUTY CLERK NUMBER



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT MYLAN and JOHN TARKO.

E.D.N.Y.

76 Cr. 467

MISHLER, CH.J.

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RP:GAW:rd
761,941

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
JUL 22 1976

TIME A.M.
P.M.

----- X
UNITED STATES OF AMERICA

-against-

ROBERT E. MYLAN and
JOHN A. TARKO,

Defendants.

I N D I C T M E N T

Cr. No. _____
(T. 18, U.S.C. §§2, 371,
and 641).

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,404,783 payable to Abraham Stember in the amount of Two Hundred Ninety Seven Dollars and Seventy-Eight Cents (\$297.78) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2). C-4

COUNT TWO

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,404,957 payable to William M. Moriarty in the amount of Two Hundred Fifty Three Dollars and Eighty-One Cents (\$253.81) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

①

COUNT THREE

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,405,037 payable to Vincent J. Gugleotti in the amount of Two Hundred Sixty Five Dollars and Fifty-Eight Cents (\$265.58) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2). C-5

COUNT FOUR

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,405,042 payable to Donald F. Jordan in the amount of Two Hundred Eighteen Dollars and Eighty-Four Cents (\$218.84) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT FIVE

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,406,994 payable to Irving G. Frohman in the amount of

Four Hundred Five Dollars (\$405.00) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT SIX

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,408,924 payable to William Yearwood in the amount of One Hundred Seven Dollars and Ninety Cents (\$107.90) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT SEVEN

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,407,006 payable to Hubert S. Pearlman in the amount of One Hundred Ninety Seven Dollars and Fifty Cents (\$197.50) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT EIGHT

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,409,273 payable to Salvatore J. Piccirilli in the amount of Five Hundred Forty Eight Dollars and Ninety-Two Cents (\$548.92) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2). C-8

COUNT NINE

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,409,625 payable to Virgil F. Ratta in the amount of Five Hundred Fifty Eight Dollars and Fifty-Three Cents (\$558.53) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT TEN

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,409,667 payable to Sam F. Biafore in the amount of

Five Hundred Thirty Six Dollars and Ninety-One Cents (\$536.91) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT ELEVEN

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,409,760 payable to Elton G. Sayward in the amount of Three Hundred Seven Dollars and Eleven Cents (\$307.11) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

C-10

COUNT TWELVE

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,405,013 payable to Victor R. Sotoaleca in the amount of Two Hundred Forty Five Dollars and Sixty-Seven Cents (\$245.67) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

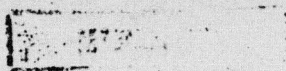
COUNT THIRTEEN

On or about the 1st day of June, 1976, within the Eastern District of New York, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO wilfully and knowingly did receive, conceal and retain stolen property of the United States, that is a United States Treasury check number 25,409,210 payable to Robert A. Statham in the amount of One hundred Five Dollars and Twenty-One Cents (\$195.21) with intent to convert said check to their own use, the defendants ROBERT E. MYLAN and JOHN A. TARKO then knowing said check to have been stolen. (Title 18, United States Code, Sections 641 and 2).

COUNT FOURTEEN

Commencing on a date unknown to the Grand Jury and continuing through the 1st day of June, 1976, within the Eastern District of New York and elsewhere, the defendant ROBERT E. MYLAN and the defendant JOHN A. TARKO, did knowingly and wilfully conspire to commit offenses against the United States, in violation of Title 18, United States Code, Sections 641 and 1708, by conspiring to possess, conceal and retain with intent to convert to their own use, the contents of letters stolen from the United States mail which were items of value belonging to the United States, to wit: quantities of United States Treasury checks of value in excess of Two Hundred Eighty Thousand Dollars (\$280,000), the defendants knowing the same to have been stolen. (Title 18, United States Code, Section 371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the



FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ OCT 18 1976 ★

TIME A.M.

P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 CR 467

UNITED STATES OF AMERICA

-against-

Memorandum of Decision
and Order

ROBERT E. MYLAN and
JOHN A. TARKO,

Defendants.

October 15, 1976

MISHLER, CH. J.

The defendants move for an order, pursuant to Rule 12(b)(3) and Rule 41(f) of the Federal Rules of Criminal Procedure, suppressing (1) contraband seized on June 1, 1976, from the defendant Mylan's automobile; and (2) statements allegedly made by the defendants to federal agents.

The defendants were indicted in July 1976 for conspiracy to possess and possession of stolen United States Treasury checks, in violation of 18 U.S.C. §§641 and 2. The indictment stems from the seizure, pursuant to a warrant, of \$280,000 in Treasury checks from a car

(5)

driven by Robert Mylan. Mylan was arrested immediately after the seizure and later made allegedly incriminating statements during a conversation with a federal agent, which Mylan had initiated for the purpose of recovering his automobile, seized at the time of his arrest.

Tarko was arrested one month after Mylan's arrest and, both before and after his arrest, he too made allegedly incriminating statements during conversations with federal agents. Since an evidentiary hearing is necessary to resolve the motions to suppress the defendants' oral admissions, we deal here with the motion to suppress evidence seized from Mylan's car. Parenthetically, Tarko's standing to object to the seizure of the securities apparently is based on his claim that the seized securities were used to identify him and to elicit incriminating statements at the time of his arrest.

Since the search of Mylan's car and the seizure of the securities was conducted pursuant to a warrant, the issue before the court is whether the affidavits supporting the search warrant were insufficient to show probable cause. The warrant was based on the affidavit of Eugene L. Crouch, a special agent of the Federal Bureau of

Investigation. The issuing magistrate was informed by the affidavit that the source of the deponent's information was "[a] confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past which information has led directly to the recovery of a total in excess of Seventy Thousand Dollars (\$70,000.00) in stolen negotiable securities." According to the informant, Robert Mylan was in possession of \$500,000 worth of stolen Treasury checks and, during the week of May 3-7, Mylan traveled to New York to show the checks to a prospective buyer. The informant "personally observed" one of the sample checks, noting the serial number. Sometime later, Mylan, according to the informant, consummated the sale with his New York City buyer. The informant was again in a position to observe the checks, and again noted the serial number of one of these checks. Independent investigation by the Federal Bureau of Investigation revealed that government checks bearing the numbers noted by the informant were valid; that the checks were not owned by Mylan; and that these checks had been "stolen in bulk" from the United States mails while enroute to Rochester, New York, sometime after April 29, 1976. In addition, a New Jersey license

plate number and the description of the car driven by Mylan provided by the informant matched that of a car registered to Robert Mylan. Finally, according to the affidavit, the informant advised the government that on June 1, 1976, Mylan would drive to LaGuardia Airport to deliver stolen checks to a buyer. According to the informer, the checks, in the amount of \$200,000, were "dated on or about May 30 or May 31, 1976." On June 1, 1976, Mylan was observed driving a car, whose description had been provided by the informant, north on the Garden State Parkway toward New York. Moreover, the Kansas City office of the Federal Bureau of Investigation informed the agents on the Mylan case that a shipment of government checks dated May 31, 1976, had been mailed on May 30th to Rochester, New York, the same destination of the checks stolen after April 29th. That same day, June 1, 1976, the search warrant was issued by the magistrate; the warrant was executed and \$280,000 in government checks was seized from Mylan's car.

The Supreme Court's decision in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969), formulated the basic principles governing the sufficiency of a

warrant application:

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible" or his information "reliable."

Aguilar v. Texas, supra at 114, 84 S.Ct. at 1514 (footnote and citations omitted). See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960). The supporting affidavits, however, must be tested and interpreted in a common sense manner without requiring hypertechnical specificity in order to find the existence of probable cause. See United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965); United States v. Soyka, 394 F.2d 443, 453 (2d Cir. 1968) (Friendly, J.) (en banc), cert. denied, 393 U.S. 1095, 89 S.Ct. 883 (1969); United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209, 218 (2d Cir. 1967), remanded en banc, 381 F.2d 221 (2d Cir. 1967). With this consideration in mind, we turn to an examination of whether the

affidavit satisfies the Aguilar-Spinelli requirements.

Here, the affidavit provided sufficient information for the issuing magistrate to conclude that the informer was credible. The first paragraph stated that information provided by the informer on a past occasion had been accurate, leading directly to the recovery of stolen securities. See Rugendorf v. United States, 376 U.S. 528, 84 S.Ct. 825 (1964). Moreover, the Supreme Court has recognized that the credibility of the informant can be demonstrated by matching information gathered by the police against that provided by the informer. Spinelli v. United States, supra at 417-18, 39 S.Ct. at 589-90, discussing Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959); United States v. Canestri, 518 F.2d 269, 272 (2d Cir. 1975). The information provided by the informant concerning the license plate and description of Mylan's car, the serial numbers and dates of the stolen checks and the direction in which Mylan was driving on June 1st, was corroborated in its entirety by independent police inquiry and surveillance.

As to the other prong of the Aguilar test, that the information provided by the informant be reliable, the magistrate here was properly informed of some of the

underlying circumstances from which the informant concluded that Mylan was engaged in illegal sales of stolen securities. In Spinelli, "the Supreme Court gave recognition to personal observation as a reliable basis for an informant's report." United States v. Viggiano, 433 F.2d 716, 719 (2d Cir. 1970), cert. denied, 401 U.S. 938, 91 S.Ct. 934 (1971). The informant here stated that he personally observed stolen checks that, on two occasions, were exhibited or sold by Mylan. See United States v. Canestri, supra at 272. Moreover, investigation revealed that checks bearing the serial numbers noted by the informant indeed had been stolen from the United States mails. A person of reasonable caution could infer that the Federal Bureau of Investigation's informant was either assisting Mylan in the sale of the stolen checks or was sufficiently friendly with Mylan to be in a position to observe the preparations for the sales or the actual sales themselves. Indeed, the nature of the other information provided by the informer—the description of Mylan's car, the direction he was driving on June 1st, the amount of money secreted in the car—supports just such an inference. The supporting affidavits plainly show that the informant was relying "on something more

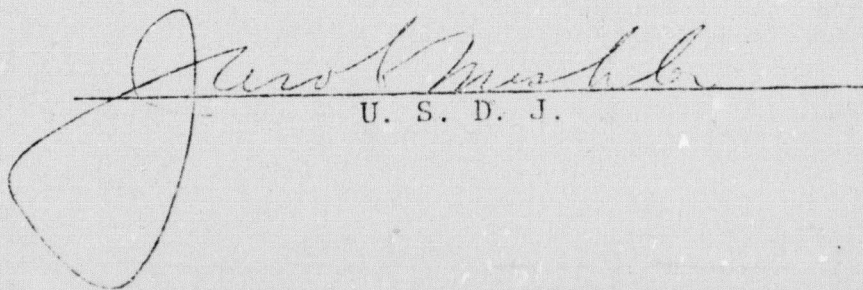
substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, supra at 416, 89 S.Ct. at 539.

Accordingly, the defendants' motion to suppress the seized government checks is denied. The evidentiary hearing on the oral admissions will be held on the first day of the trial, scheduled to begin on November 22, 1976.

It is

SO ORDERED.

The Clerk of the Court is directed to enter judgment dismissing the defendants' motion to suppress.


U. S. D. J.

defendants ROBERT E. MYLAN and JOHN A. TARKO committed the following:

OVERT ACTS

1. On June 1, 1976 the defendant ROBERT E. MYLAN proceeded to La Guardia Airport, Queens, New York in possession of approximately 702 U.S. Treasury checks.

2. The Grand Jury repeats and realleges each and every allegation contained in Counts One through Thirteen as if more fully set forth herein.

A TRUE BILL

Joyce La Cagna
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

DOF:DAD:dmb
F.#761,665

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket No.

Case No.

vs.

VEHICLE KNOWN AND DESCRIBED AS
A 1975 LINCOLN, BEARING NEW JERSEY
LICENSE PLATE NUMBER 777 CYS

SEARCH WARRANT

TO ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION AND/OR ANY OTHER
AUTHORIZED OFFICER

Affidavit(s) having been made before me by W. STEPHEN BURSEY, SPECIAL AGENT OF
THE FEDERAL BUREAU OF INVESTIGATION

that he has reason to believe that { ~~REDACTED~~
is the ~~PERSON~~ known as
IN VEHICLE

A 1975 LINCOLN, BEARING NEW JERSEY LICENSE PLATE NUMBER 777 CYS

in the Eastern District of New York

there is now being concealed certain property, namely

here describe property

approximately four hundred thousand (\$400,000; dollars in stolen
U. S. Government checks being possessed, concealed and retained
in violation of Title 18, United States Code, Section 641

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit.

You are hereby commanded to search within a period of 10 days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search ~~in the daytime (between 6:00 a.m. and 6:00 p.m.)~~ and if the property be found here to seize it leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before me as required by law.

Federal judge or magistrate

Dated this

1 day of

June

1976

2:18 P.M.

EST

Wm. H. Catogger
Judge (Federal or State Court of Record) or Federal Magistrate.

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at time other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "in any time day or night" pursuant to Rule 41(c).

UNITED STATES OF AMERICA,

ROBERT E. MYLAN and JOHN A. TARKO.

JOHN A. TARKO,

S I R S :

1. An order suppressing from introduction into evidence any testimony or other evidence regarding statements allegedly made by the defendant, John Tarko, on July 1, 1976.

2. An order controverting a warrant dated June 1, 1976, and suppressing from introduction into evidence any and all property including Government checks seized from the defendant MYLAN or automobile during a search of his person and/or the automobile on June 1, 1976.

3. An order granting the defendant, Tarko, the assistance of an expert in fingerprint identification to assist in his defense.

4. An order granting such other and further relief as to this Court seems just and proper.

Dated: Mineola, New York
September 1, 1976

Yours, etc.,

DAVID W. McCARTHY
McCARTHY and DORFMAN
Suite 310
1527 Franklin Avenue
Mineola, New York 11501
(516) 746-1616

To: Hon. David Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

: AFFIRMATION

-against-

: 78 CR 467

ROBERT E. MYLAN and JOHN A. TARKO,

Defendants.

JOHN A. TARKO,

Defendant.
-----X

STATE OF NEW YORK)

ss.:

COUNTY OF NASSAU)

I, DAVID W. MCCARTHY, an attorney admitted to practice in the Courts of this State, and being the attorney of record for the defendant, JOHN TARKO, affirms, under the penalties of perjury, that the following facts, upon information and belief, are true:

The statements herein are based upon the complaint, indictment, an affidavit in support of an application for a search warrant, and conversations with the defendant and others.

Regarding the motion to controvert and suppress, John Tarko is one of the defendants herein. This affirmation is submitted in support of a Motion to Suppress from the introduction into evidence against him:

1. \$280,000 in stolen Government checks allegedly seized from Robert Mylan on June 1, 1976.

2. Two conversations allegedly had between John Tarko and Special Agents of the F.B.I. on July 1, 1976.

BACKGROUND

On June 1, 1976, an application was made to the magistrate in the Eastern District of New York for a warrant to search a 1975 Lincoln driven by Robert Mylan. The affidavit in support of the application and the warrant are reproduced supra (appendices A and B).

On the same day, the warrant was executed and \$280,000 in Government checks were seized from the Lincoln. Mylan was arrested.

Exactly one month later, the F.B.I. called John Tarko and said they wanted to speak to him. Tarko met them on a corner and was taken to F.B.I. headquarters. While there, apparently before arrest, he made certain statements, the report of which is appended hereto (appendix c). Subsequently, while he was being fingerprinted, he is alleged to have made a second statement which will also be offered against him at trial. The report reflecting this statement is also appended (appendix D).

I. The Motion to Controvert the Warrant and Suppress the Government Checks

(a) The warrant must be controverted because the affidavit does not establish probable cause.

1. The reliability of the confidential informant is not established. The only factual basis offered to support this requirement is paragraph (1) of the affidavit. Because the information is in conclusory form, it is not supportive of reliability. The author assiduously avoided stating whether the informant stated that the checks were located in a certain place or on the person of any person. Moreover, that the information led "directly" to a seizure is a mere interpretation of the informant's statement without stating what facts establish the validity of the interpretation.

(b) At no time was the relevant information purportedly establishing probable cause alleged to have been upon personal knowledge.

1. Paragraph 1 merely alleges in conclusory fashion that Mylan had stolen checks in his possession. Paragraph 2 focusses upon the personal knowledge requirement but is more relevant for what it does not contain. At no time is there an allegation that the informant saw Mylan in possession of the checks, nor who was in possession thereof. His personal observation was limited to one check without establishing its location or possessor. Additionally, the source for the informant's information regarding Mylan's purpose in being in New York or the asking price is not stated.

Paragraph 3 similarly adds nothing establishing relevant personal knowledge. The only personal observation is of some

checks, their location or possessor is not stated. Indeed, while he alleged a transfer to a buyer, he does not contend he personally observed the exchange and his source for his allegation is not expressed.

Paragraph 6 is silent as to the basis of the information, aside from the fact that it is recitation of the informant.

(c) Even assuming that paragraph 2 established that personal knowledge was the source for the allegation contained therein, the warrant is deficient.

Clearly, the affidavit itself establishes that the checks which were the subject of the paragraph were exchanged before June 1. The checks which are to be seized pursuant to this search warrant are a separate and distinct shipment.

As contended above, there are no facts showing the basis for the information alleging possession of this second shipment of checks. Moreover, no facts were alleged establishing probable cause to believe that they were in fact stolen. The information referring to Mylan on June 1 merely shows that the informant knew that he would be driving toward New York City, a non-uncommon event in the Megalopolis, that he would be driving a certain type of car and that he would be at a certain location. There is nothing observable which demonstrates criminal activity except the conclusory unsupported accusation of the informant.

II. The Motion to Suppress the Statements

(a) Both statements must be suppressed because the defendant, Tarko, was not properly advised of his constitutional rights pursuant to the Miranda decision and, assuming, properly given, they were not knowingly and intelligently waived.

Appendix clearly establishes that the defendant did not waive any of his rights. In fact, it is clear that rather than a clear waiver, he expressed uncertainty as to the course to follow which is contrary to a waiver.

(b) Even assuming a proper exposition of the Miranda rights, and a knowing waiver regarding the first conversation, his subsequent statement was elicited after he asserted his right to counsel. During fingerprinting, he merely asked what bail would be set. An inquiry was then posed clearly intended to elicit, and the Government contends it did elicit, an incriminating statement.

(c) The statements should be suppressed as the fruit of the illegal search and seizure. The agents clearly exploited the illegally seized evidence in questioning the defendant by explicitly stating that they had found his fingerprints on some of the checks which were the subject of the June 1 seizure.

Moreover, the defendant's identity was obtained as the result of the seizure of the checks and on that alone is an exploitation of the illegal search and seizure.

(d) Additionally, the statements were the product of defendant's illegal arrest, in that it was made without probable cause.

III. With respect to the application for a fingerprint identification expert.

The defendant has been previously adjudicated eligible for assistance as an indigent pursuant to the Criminal Justice Act. Your affirmant has been assigned pursuant to said Act. Moreover, counsel is informed that certain evidence, purportedly based upon fingerprint identification will be offered against the defendant.* In order to present a proper response to this type of evidence, counsel would need the assistance of an expert not only to advise him but also, should the proper circumstances arise, to testify for the defense.

WHEREFORE, the defendant prays that an order issue granting the following relief:

1. Suppressing from introduction into evidence any testimony or other evidence regarding statements allegedly made by the defendant, John Tarko, on July 1, 1976.

2. Controverting a warrant dated June 1, 1976, and suppressing from introduction into evidence any and all property including Government checks seized from the defendant MYLAN or automobile during a search of his person and/or the automobile on June 1, 1976.

*As of the date of this motion, counsel has not been provided with a copy of the relevant reports.

3. Granting the defendant, Tarko, the assistance of an expert in fingerprint identification to assist in his defense and such other and further relief as to this Court seems just and proper.

/s/
DAVID W. McCARTHY

Dated: Mineola, New York
September 1, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :

-against- :

ROBERT MYLAN, :

Defendant. :

NOTICE OF MOTION

76 CR 467

-----X
S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of MARION SELTZER, duly sworn to this 2nd day of September, 1976, and upon all the papers and proceedings heretofore had herein, the undersigned, on behalf of ROBERT MYLAN, will move this Court, before the Honorable JACOB MISHLER, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on a date to be set by the Court, for an order, pursuant to Rule 12(b)(3) and Rule 41(f) of the Federal Rules of Criminal Procedure, suppressing (1) any and all property and contraband seized on June 1, 1976 from the defendant's automobile pursuant to a search warrant dated June 1, 1976, and (2) any and all statements, with all the leads and information that may have flowed therefrom, elicited from the defendant as a result of a telephone conversation on June 3, 1976 between the defendant and Special Agent Crouch; and for such other and further relief as the Court may deem just and proper. G-33

DATED: BROOKLYN, NEW YORK
September 2, 1976.

Yours, etc.,

WILLIAM GALLAGHER, ESQ.,
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
26 Court Street, Room 701
Brooklyn, New York 11242

TO: DAVID G. TRAGER, ESQ.,
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

CLERK, UNITED STATES DISTRICT COURT
BROOKLYN, NEW YORK

G-34

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-against- : AFFIDAVIT

ROBERT MYLAN, : 76 CR 299

Defendant. :

-----X

STATE OF NEW YORK)
COUNTY OF KINGS) SS:

MARION SELTZER, being duly sworn, deposes and says:

1. She is an attorney associated with WILLIAM J. GALLAGHER, ESQ., Federal Defender Services Unit/The Legal Aid Society, the attorney of record assigned under the Criminal Justice Act to represent the defendant herein, ROBERT MYLAN.

2. This affidavit is submitted in support of a motion, made pursuant to Rule 12(b)(3) and Rule 41(f) of the Federal Rules of Criminal Procedure, for an order suppressing (1) any and all property and contraband seized from the defendant's automobile pursuant to a search warrant dated, executed and filed in the Eastern District of New York on June 1, 1976 and (2) any and all statements, with all the leads and information that may have flowed therefrom, elicited from the defendant as a result of a telephone call with Special Agent Crouch on June 3, 1976; and for such other and further relief as the Court may deem just and proper. G-35

3. The Deponent believes as a result of conversations with the defendant, discovery materials made available by the Government, and an inspection of the complaint and indictment, that the information contained in the "Affidavit for a Search Warrant" *signed by Special Agent Eugene L. Crouch on June 1, 1976 and used as the basis for the signing of the search warrant by the Magistrate, was insufficient to establish probable cause for the issuance of that warrant.

*Exhibit A.

Your deponent's belief is based on the following:

(a) The previous reliability of the confidential informant had not been established, in that, upon information and belief, the sole prior information provided to the government which led to the recovery of \$70,000 in stolen negotiable securities was the recovery of contraband that was the subject of an arrest in which the informant was a defendant.

Deponent would therefore further move that either the name of the informant be disclosed, or if the Government refuses to do so, that an incamera interview of him be had by the Court to determine the exact nature of his previous "reliability."

Deponent believes that the affidavit is insufficient, in that, it fails to describe the manner in which the informant acquired his information with a sufficient degree of particularity.

(b) Deponent further believes that the affidavit is insufficient, in that, it fails to allege any personal observation either by the informant or by the Agents of the checks. Paragraph (2) of the affidavit makes several oblique references to this situation but never actually alleges that the informant saw Mr. Mylan in possession of any of the stolen checks dated April 29, 1976.

(c) Deponent further believes that the affidavit is insufficient, in that, the object of the search was checks dated May 31, 1976.

However, while there is verification that the April 29, 1976 checks were stolen, (paragraph 5 of the affidavit), and therefore there could possibly be probable cause if the object of the search warrant was those checks, there was never any determination that the May 31, 1976 checks had been stolen. Therefore, there was no evidence that a crime had been committed at the time that application was made for a search warrant seeking to recover \$280,000. in checks dated May 31, 1976.

Paragraph (6) of the affidavit referring to the "280,000 worth of stolen checks" is a conclusion that is unsubstantiated by anything else in the affidavit. Paragraph (8) saying that the May 31, 1976 checks had in fact been mailed does not in and of itself lead to the inference that they were subsequently stolen.

The affidavit is trying to use the information that was available regarding an April 29, 1976 crime as probable cause for another crime (May 31, 1976), the existence of which had not yet been adequately determined. Deponent suggests that this is not sufficient for establishing probable cause.

4. Deponent also moves to suppress a statement made as a result of a telephonic communication to Agent Crouch on June 3, 1976, by Robert Mylan.*

Upon information and belief Mr. Mylan telephoned the agent solely for the purpose of recovering his automobile which was seized at the time of his arrest. Deponent suggests that during a post-arraignment period such as this, knowing that

counsel had been assigned it was not proper to initiate a conversation relating to the subject of the source of the stolen checks when the purpose of Mr. Mylan's phone call had nothing to do with that.

In addition, deponent suggests that the statements made by Mr. Mylan were so vague that they would be meaningless, if introduced at trial and would only serve to confuse a jury.

5. WHEREFORE, it is respectfully urged that an order be entered suppressing (1) any and all property and contraband seized from the defendant's automobile and (2) any and all statements elicited from the defendant as a result of his telephone conversation with Agent Couch, or, that a hearing be conducted to determine their admissibility; and for such

*Exhibit B

other and further relief as the Court may deem just and proper.

Marion Seltzer

MARION SELTZER

Sworn to before me this
2nd day of September, 1976.

Susan Schimer

SUSAN SCHIMER
Notary Public, State of New York
No. 24-910099
Qualified in Kings County
Term Expires March 30, 1977

STATE OF NEW YORK)

ss.:
COUNTY OF NASSAU)

HELANA COLETTA, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age
and resides at 232 Ohio Street, Hicksville, New York.

On April 22, 1977 deponent served the within Brief and
Appendix upon David Trager, attorney for People in this action
at U.S. Attorney for the Eastern District, 225 Cadman Plaza, East,
Brooklyn, New York 11201 the address designated by said attorney
for that purpose by depositing a true copy of same enclosed in
a post-paid properly addressed wrapper, in--a post--office--
official depository under the exclusive care and custody of the
United States Postal Service within the State of New York.

Sworn to before me on
April 22, 1977.

David W. McCarthy

DAVID W. MCCARTHY
NOTARY PUBLIC, State of New York
No. 41-4525115
Qualified in Nassau County
Registered in Queens Co.
Commission Expires March 30, 1978

Helana Coletta
HELANA COLETTA